83-236

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

PORTLOCK COMMUNITY ASSOCIATION (MAUNALUA BEACH); KOKOHEAD COMMUNITY LEASE-FEE, INC.; WEST MARINA COMMUNITY ASSOCIATION; HAHAIONE VALLEY COMMUNITY ASSOCIATION,
Appellants,

VS.

FRANK E. MIDKIFF, RICHARD LYMAN, JR., HUNG WO CHING, MATSUO TAKABUKI and MYRON B. THOMPSON, Trustees of the Kamehameha Schools/Bishop Estate,
Appellees.

JURISDICTIONAL STATEMENT OR PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED BY PORTLOCK COMMUNITY ASSOCIATION (MAUNALUA BEACH); KOKOHEAD COMMUNITY LEASE-FEE, INC.; WEST MARINA COMMUNITY ASSOCIATION; AND HAHAIONE VALLEY COMMUNITY ASSOCIATION INC.

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ASSOCIATION, INC.; HAHAIONE VALLEY COMMUNITY, INC.; KAMILOIKI COMMUNITY ASSOCIATION; LUNALILO MARINA COMMUNITY ASSOCIATION; MARINERS RIDGE AND COVE FEE/LEASE CONVERSION COMMITTEE; SPINNAKER ISLE ASSOCIATION; WAIALAE IKI COMMUNITY ASSOCIATION; WAIAU COMMUNITY ASSOCIATION; KAHALA COMMUNITY ASSOCIATION, INC.; KAHALA COMMUNITY FEE PURCHASE FUND and HALAWA VALLEY ESTATES FEE CONVERSION CORPORATION,
Intervenors-Appellants,

vs.

FRANK E. MIDKIFF, RICHARD LYMAN, JR., HUNG WO CHING, MATSUO TAKABUKI and MYRON B. THOMPSON, Trustees of the Kamehameha Schools/Bishop Estate,
Plaintiffs-Appellees.

QUESTIONS PRESENTED

1. Whether Hawaii's Land Reform Act, providing for the condemnation of lessor's leased fee interests in land held in concentrated ownership under long term leases, is unconstitutional under the Fifth and Fourteenth Amendments to the United States Constitution.

(The decision below holding the Act unconstitutional is contrary to *Berman v. Parker*, 348 U.S. 26 (1954) and in conflict with the decision of the Court of Appeals for the Third Circuit in *Puerto Rico v. Eastern Sugar Associates*, 156 F.2d 316 (1st Cir.), *cert. denied*, 329 U.S. 772 (1946)).

2. Whether the court below erred in failing to give the findings of the Hawaii Legislature the appropriate weight and deference due from a federal court.

(The decision below conflicts with the holdings of this Court in *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978) and *Clark v. Nash*, 198 U.S. 361 (1905)).

3. Whether the Court of Appeals should have abstained from deciding the constitutional question pending resolution of contemporaneous proceedings in Hawaii courts.

(The decision below refusing to abstain conflicts with the decision of the Court of Appeals for the Seventh Circuit in *Ahrensfeld v. Stephens*, 528 F.2d 193 (7th Cir. 1975)).

PARTIES (Rule 21.1(b))

The parties filing this statement are homeowner-lessees, intervenors on the side of defendants in the District Court. Names of all the parties are set forth in the caption. The associations or corporations which are parties do not have parents, subsidiaries or affiliates. Members of interested parties include several thousand homeowners in Hawaii.

TABLE OF CONTENTS

TABLE OF AUTHORITIES CITED

Cases

TABLE OF AUTHORITIES CITED

CASES

Constitutional Amendments

Statutes

TABLE OF AUTHORITIES CITED

Treatises

No. 83-141

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

PAUL A. TOM, TONY TANIGUCHI, WILBERT K. EGUCHI, WAYNE T. TAKAHASHI, LAWRENCE N. C. ING, NOBUYOSHI TAMURA, ANDREW I. T. CHANG, and DAVID SLIPHER, Commissioners of the Hawaii Housing Authority; FRANKLIN Y. K. SUNN, Executive Director of the Hawaii Housing Authority; and HAWAII HOUSING AUTHORITY

Defendants-Appellants,

and

WAI-KAHALA TRACT "H" ASSOCIATION, INC.; HALAWA HILLS LANSDALE COMMITTEE; AWAKEA ASSOCIATION; ALII SHORES COMMUNITY ASSOCIATION; ENCHANTED HILLS, UNIT I; PORTLOCK COMMUNITY ASSOCIATION (MAUNALUA BEACH); KOKOHEAD COMMUNITY LEASE-FEE, INC.; WEST MARINA COMMUNITY ASSOCIATION; KALAMA VALLEY COMMUNITY ASSOCIATION; MAUNALUA TRIANGLE-KOKO KAI COMMUNITY ASSOCIATION, INC.; HAHAIONE VALLEY COMMUNITY ASSOCIATION, INC.; KAMILOIKI COMMUNITY ASSOCIATION; LUNALILO MARINA COMMUNITY ASSOCIATION; MARINERS RIDGE AND COVE FEE/LEASE CONVERSION COMMITTEE; SPINNAKER ISLE ASSOCIATION; WAIALAE IKI COMMUNITY ASSOCIATION; WAIAU COMMUNITY ASSOCIATION; KAHALA COMMUNITY ASSOCIATION, INC.; KAHALA COMMUNITY FEE PURCHASE FUND and HALAWA VALLEY ESTATES FEE CONVERSION CORPORATION,

Intervenors-Appellants,

vs.

FRANK E. MIDKIFF, RICHARD LYMAN, JR., HUNG WO CHING, MATSUO TAKABUKI and MYRON B. THOMPSON, Trustees of the Kamehameha Schools/Bishop Estate,

Plaintiffs-Appellees.

JURISDICTIONAL STATEMENT OR PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED BY PORTLOCK COMMUNITY ASSOCIATION (MAUNALUA BEACH); KOKO HEAD COMMUNITY LEASE-FEE, INC.; WEST MARINA COMMUNITY ASSOCIATION; AND HAHAIONE VALLEY COMMUNITY ASSOCIATION INC., INTERVENORS-APPELLANTS

Petitioner-intervenors Portlock Community Association (Maunalua Beach); Koko Head Community Lease Fee, Inc.; West Marina Community Association; and Hahaione Valley Community Association, Inc. respectfully file this Jurisdictional Statement to review the decision of the United States Court of Appeals for the Ninth Circuit entered on March 28, 1983.

OPINIONS BELOW

Concentration of land ownership in Hawaii has been maintained by leasing, instead of selling homesites. The Hawaii Land Reform Act remedies this situation by providing for the condemnation by the Hawaii Housing Authority of the lessor's leased fee interests. The decisions below dealt with the statute as follows:

Midkiff v. Tom, 471 F.Supp. 871 (D. Hawaii 1979), Appendix C, held that mandatory arbitration provisions of the Hawaii Land Reform Act to determine just compensation to the lessors for their reversionary interest were unconstitutional and enjoined their enforcement. The opinion raised a serious question as to the method of evaluating the lessor's interests. (These provisions were subsequently deleted from the statute). The decision in this opinion was not appealed, but the opinion contains some of the legislative history of the statute and recites most of the relevant positions of the statutes involved.

Midkiff v. Tom, 483 F.Supp. 62 (D. Hawaii 1979), *rev'd,* 702 F.2d 788 (9th Cir. 1983), Appendix B, a further proceeding in the same action, held that the remaining provisions of the Land Reform Act of the State of Hawaii providing for the condemnation of the lessors' interests were constitutional on their face and that the plaintiffs could not have an evidentiary hearing to show that the legislative premises for the statute were wrong. Judgment pursuant to this opinion resulted in the instant appeal.

Midkiff v. Tom, 702 F.2d 788 (9th Cir. 1983), Appendix A, held that, despite pending state actions, the federal courts should not abstain from deciding the constitutional issue and that, on the merits, the Hawaii Land Reform Act was unconstitutional. There was a strong dissent on both issues. While the decision of the court held the statute unconstitutional on its face, the essential concurring opinion found the statute unconstitutional upon the "evidence of record."

These opinions are in the Appendix to this petition.

JURISDICTION

Jurisdiction in the District Court was grounded on 28 U.S.C. § 1331 (Supp. IV 1980) (federal question), 28 U.S.C. § 1343 (Supp. IV 1980) (civil rights), 28 U.S.C. § 2201 (Supp. IV 1980) (declaratory relief), and 42 U.S.C. § 1983 (Supp. IV 1980) (civil rights, color of state law).

The opinion of the United States Court of Appeals for the Ninth Circuit was filed on March 28, 1983.

Petitions for rehearing and suggestions for rehearing en banc were filed by defendants and intervenors, appellees, in the Court of Appeals on or before April 11, 1983, and were all denied on June 17, 1983. These intervenor-appellants filed a Notice of Appeal on July 15, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(2) (1976).

Jurisdiction of this Court has been invoked under 28 U.S.C. § 1254(2) (1976) inasmuch as the Hawaii Land Reform Act was held to be invalid as repugnant to the Constitution of the United States. Your petitioners have designated this statement as petition for certiorari in the

alternative to invoke jurisdiction under 28 U.S.C. § 1254(1) (1976) because they are uncertain as to whether they can raise questions of scope of review and abstention by appeal. *See Doran v. Salem Inn, Inc.*, 422 U.S. 922, 927 (1975).

STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part as follows: "nor shall any person . . . be deprived of . . . property, without due process of law; nor shall private property be taken for public use without just compensation." U.S. Const. amend. V, cl. 4, 5.

The Fourteenth Amendment, Section One, to the Constitution of the United States provides in pertinent part as follows: "nor shall any state deprive any person of . . . property, without due process of law; . . . ." U.S. Const. amend. XIV, § 1.

The Hawaii Land Reform Act is set forth in 1967 Hawaii Sess. Laws Act 307 as amended by 1968 Hawaii Sess. Laws Act 46, 1969 Hawaii Sess. Laws Act 203, 1971 Hawaii Sess. Laws Act 215, 1975 Hawaii Sess. Laws Acts 184, 185, 186; 1976 Hawaii Sess. Laws Act 242, and 1978 Hawaii Sess. Laws Act 140. They are set forth in Hawaii Rev. Stat. ch. 516 (1976).

The provisions of the Hawaii Land Reform Act setting forth its economic and social background are lengthy. Among other things, the legislature found that land ownership in Hawaii is concentrated in the hands of a few. Pertinent text of 1967 Hawaii Sess. Laws Act 307, and 1975 Hawaii Sess. Laws Acts 184, 185 and 186 are set forth as Appendices D, E, F and G.

STATEMENT OF THE CASE

The Trustees of the Estate of Bernice Pauahi Bishop[1] filed suit in the District Court on February 28, 1979, against the Commissioners and Executive Director of the Hawaii Housing Authority and the Hawaii Housing Authority itself, claiming the Hawaii Land Reform Act was unconstitutional. The Act allows the State in the exercise of its police power, to use the power of eminent domain to condemn the lessor's leased fee interest in residential land and then to sell these interests to the residential lessees. The Hawaii Housing Authority is given the power and duty to carry out the provisions of the Act.

In Hawaii a few landowners including the Bishop Estate own large tracts of residential land. The Legislature found that at least three-fourths of all privately held land in Hawaii was currently owned by this small group. On Oahu alone, twenty-two major private landowners own 72.5% of all land. It has been the policy of these landowners to offer long-term leases to individual lessees rather than to offer residential lots in fee. Although in recent years some of the leased land has been sold to individual lessees, much of the land is still not available for purchase. The Legislature of the State of Hawaii viewed this system of land holding as injurious to the well-being of the people of Hawaii, and adopted the Land Reform Act to provide for condemnation of the leased fee interests. Appendix 115-16, 133.

The Hawaii Legislature found that the system of land holding had adverse economic and non-economic effects

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[1]In 1887 Princess Bernice Pauahi Bishop, the last lineal descendant of King Kamehameha the Great, established by Will the Kamehameha Schools/Bishop Estate. The Estate is a perpetual educational trust for the support of two schools, one for boys and one for girls of native Hawaiian descent, known as the Kamehameha Schools.

on the people as a whole including a serious shortage of fee simple residential land; artificial inflation of residential land values; the deprivation of a choice to own or take a lease of land on which homes are situated; and the evils of a continuing inflationary trend of residential land. Appendix 116-17. The Legislature determined that these facts vitally affected the economy and the public health and welfare. Appendix 118. By 1975 the Legislature found that the system was adversely affecting elderly residential leaseholders who were losing their homes. Appendix 135. In particular, petitioners herein refer to findings of the Legislature that lease rentals increased on renegotiation from 400% to 1,000%, and that renegotiation rental at times exceeded mortgage payments. In 1975, the number of outstanding residential leases had increased by more than 10,000 since the passage of the 1967 Act. Appendix 134, 154.[2]

The Legislature found that even after the passage of the 1967 Act, the major private landowners continued to act just as they had before the passage of the Act. By 1973 long-term leaseholds constituted 32% of all owner-occupied housing, more than double the percentage in 1960. Appendix 133. Accordingly, in 1975 the Act was strengthened. Appendix E, F and G.

The history of the Hawaii Land Reform Act is remarkable in that it shows a continuing effort of the Legislature over a period of eight years to deal with a unique problem. Over this period of time it reaffirmed its original findings of concentration and abuse of power and their harmful effects on the economy. Appendix 151-54.

In the instant case, state court proceedings were pending before any proceedings of substance on the merits had

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[2] *See* Kemper, *The Antitrust Laws and Land: An Answer to Hawaii's Housing Crisis?*, 8 Hawaii B. J. 5, 5-9, 13. (1971); Conshan, *Hawaii's Land Reform Act: Is It Constitutional?*, 6 Hawaii B. J. 31 (1969).

taken place in federal court. State administrative proceedings preceded the plaintiffs' filing of their complaint herein in Federal District Court. On April 22, 1977, pursuant to the statutory requirements of the Hawaii Land Reform Act, a public hearing was held on the proposed acquisition of Tract H. On October 20, 1978, the Hawaii Housing Authority made statutorily required findings that acquisition of tract land would effectuate the public purpose underlying the Hawaii Land Reform Act. On October 23, pursuant to statute, the Trustees were directed to negotiate the sale of tract land. On January 18, 1979, the Hawaii Housing Authority declared that negotiations had failed. On January 22, 1979, the Hawaii Housing Authority ordered mandatory negotiations, which were later enjoined by the Federal District Court. Meanwhile in *Midkiff v. Amemiya*, Civ. No. 47103 (Hawaii 1st Cir., June 29, 1978) (on a complaint of the Trustees of the Bishop Estate asking for declaratory judgment), Judge Lum (now Chief Justice Lum) issued extensive findings of fact and upheld the constitutionality of lease renegotiation provisions of the Hawaii Land Reform Act. Appendix 48 *et seq*, Appendix K.

Having lost on the constitutionality issue in the state court, the plaintiffs in the instant case file their complaint in federal court on February 28, 1979. Condemnation suits were continuously pending in the state courts from before the date the District Court heard the defendants' and intervenors' motions for summary judgment until after the Court of Appeals took the instant appeal under submission. 702 F.2d 788, 811. Appendix A, A-49.

The issue of whether the District Court should have abstained was raised in the District Court. 702 F.2d 788, 789 n.1. Appendix A, A-2.[3] Before the Court of Appeals,

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[3]Defendants' and intervenors' answers specifically pled abstention as defenses. Docket Nos. 20, 35, 36 in the District Court.

defendants and intervenors urged abstention, Docket entries of October 30, November 3, and December 10, 1981, and March 29, 1982. At the time of the Court of Appeals Decision there were thirty similar condemnation cases in Hawaii scheduled for trial. On November 10, 1982 the Supreme Court of the State of Hawaii had held in similar cases that a trial was necessary to determine the constitutionality under both the Hawaii and Federal constitutions of the Hawaii Land Reform Act. Such a trial did commence in another similar case to which plaintiffs herein were parties on March 14, 1983. After the March 28, 1983 judgment of the Court of Appeals, Chief Justice Lum as Acting Administrative Head of the Judiciary of the State of Hawaii filed an amicus curiae brief opposing the issuance of an injunction against the State proceedings. Appendix L.

REASONS FOR PLENARY CONSIDERATION

1. The Decision of the Court of Appeals Holding the Hawaii Land Reform Act Unconstitutional Under the United States Constitution Is in Conflict With Decisions of This Court

The court below erred in failing to recognize that the state's power of eminent domain can validly be exercised in aid of the police power; that if a particular result can be achieved under the police power, it makes no difference that the power of eminent domain is used to achieve that result. In *Berman v. Parker*, 348 U.S. 26 (1954), this Court upheld the constitutionality of the District of Columbia Redevelopment Act of 1945 against a challenge that there was an unconstitutional taking because the plaintiffs' property would be taken and redeveloped for private, not public, use. The court noted that the power of Congress over the District of Columbia was the same as the legis-

lative powers of a state. *Berman*, 348 U.S. at 31-32. Writing for a unanimous court Justice Douglas stated:

> We deal, in other words, with what traditionally has been known as the police power. An attempt to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts. The definition is essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition. Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-neigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation, whether it be Congress legislating concerning the District of Columbia, see *Block v. Hirsh*, 256 U.S. 135, 41 S.Ct. 458, 65 L.Ed. 865, or the States legislating concerning local affairs. See *Olsen v. State of Nebraska*, 313 U.S. 236, 61 S.Ct. 862, 85 L.Ed. 1305; *Lincoln Federal Labor Union No. 19129, A. F. of L. v. Northwestern Co.*, 335 U.S. 525, 69 S.Ct. 251, 93 L.Ed. 212; *California State Ass'n Inter-Ins. Bureau v. Maloney*, 341 U.S. 105, 71 S.Ct. 601, 95 L.Ed. 788. This principle admits of no exception merely because the power of eminent domain is involved. The role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one. See *Old Dominion Land Co. v. United States*, 269 U.S. 55, 66, 46 S.Ct. 39, 40, 70 L.Ed. 162; *United States ex rel. Tennessee Valley Authority v. Welch*, 327 U.S. 546, 552, 66 S.Ct. 715, 718, 90 L.Ed. 843.

348 U.S. at 32

and

> Once the object is within the authority of Congress, the right to realize it through the exercise of eminent do-

> main is clear. For the power of eminent domain is merely the means to the end. See *Luxton v. North River Bridge Co.*, 153 U.S. 525, 529-530, 14 S.Ct. 891, 892, 38 L.Ed. 808; *United States v. Gettysburg Electric R. Co.*, 160 U.S. 668, 679, 16 S.Ct. 427, 429, 40 L.Ed. 576. Once the object is within the authority of Congress, the means by which it will be attained is also for Congress to determine. Here one of the means chosen is the use of private enterprise for redevelopment of the area. Appellants argue that this makes the project a taking from one businessman for the benefit of another businessman. But the means of eexcuting the project are for Congress and Congress alone to determine, once the public purpose has been established.

348 U.S. at 33.

The court below erred in not following the holding in *Berman*. It expressly limited the power of eminent domain to five situations, none of which included the exercise of the police power. 702 F.2d at 793-96. Appendix A, A-12 to A-17. Then it held that *Berman* "does not paint with so broad a brush" as to permit a legislature to implement its police powers by the exercise of the power of eminent domain. 702 F.2d at 796. Appendix A, A-18. It is impossible to reconcile the holding of the court below with the holding and language in *Berman*.[4]

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[4]Substantially all the commentators agree that *Berman* holds as we assert: B. Ackerman, *Private Property and the Constitution*, 190, 190 n.5 (1977); J. Gelin & D. Miller, *The Federal Law of Eminent Domain*, 15-16 (1st ed. 1982); I. Levey, *Condemnation in U.S.A.*, 214, 214 n.51 (1st ed. 1969); 1 J. Sackman & P. Rohan, *Nichols' The Law of Eminent Domain*, § 3.11[1] n.21 (rev. 3d ed. 1981); W. Stoebuck, *Nontrespassory Takings in Eminent Domain*, 14-15, 15 n.48, 31, 31 n.35 (1st ed. 1977); Blumstein, *A Prolegomenon to Growth Management and Exclusionary Zoning Issues*, 43 Law & Contemp. Probs., Spring 1979, at 5, 50; Costonis, *"Fair" Compensa-*

Prior decisions of this Court make clear that in the exercise of its police power the Hawaii Legislature could have remedied the concentration of fee simple ownership of residential lands in Hawaii by requiring complete divestiture of such interests. In *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978) this court upheld the exercise of the power of divestiture on behalf of a state. In *Exxon* a Maryland statute provided among other things that producers and refiners would no longer be permitted to operate retail service stations within the state and that their ownership in such stations would, in effect, have to be divested. A Maryland trial court held that the statute violated the due process clause of the Constitution of the United States. The Court of Appeals for Maryland held the statute valid under both the due process clause and the commerce clause of the Constitution. On appeal to this Court the judgment of the Court of Appeals of Maryland was affirmed on both grounds. Of the eight participating justices, Justice Blackmun dissented on the sole ground that the Maryland statute was an impermissible discrimination against interstate commerce. Before the Supreme Court, only one of the seven oil companies (and its subsidiary) even contested the due process ruling. Justice Stephens, speaking for the court, stated:

> Appellants' substantive due process argument requires little discussion. [footnote omitted] The evidence presented by the refiners may cast some doubt

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tion and the Accommodation Power: Antidotes for the Taking Impasse in Land Use Controversies, 75 Colum. L. Rev. 1021, 1036-37 (1975); Lashly, *The Case of Berman v. Parker: Public Housing and Urban Redevelopment*, 41 A.B.A. J. 501-03 (1955); Morris, *The Quiet Legal Revolution: Eminent Domain and Urban Redevelopment*, 52 A.B.A. J. 355-59 (1966); Editorial Note, *Aesthetics as a Justification for the Exercise of the Police Power or Eminent Domain*, 23 Geo. Wash. L. Rev. 730, 730-31, 734 (1955); 40 Iowa L. Rev. 659-63 (1955); 53 Mich. L. Rev. 883-85 (1955); Annot., 44 A.L.R. 2d 1414, 1422, 1433 (1955).

on the wisdom of the statute, but it is, by now, absolutely clear that the Due Process Clause does not empower the judiciary "to sit as a 'superlegislature to weigh the wisdom of legislation'. . . ." *Ferguson v. Skrupa*, 372 U.S. 726, 731, 83 S.Ct. 1028, 1032, 10 L.Ed. 2d 93 (citation omitted). Responding to evidence that producers and refiners were favoring company-operated stations in the allocation of gasoline and that this would eventually decrease the competitiveness of the retail market, the State enacted a law prohibiting producers and refiners from operating their own stations. Appellants argue that this response is irrational and that it will frustrate rather than further the State's desired goal of enhancing competition. But, as the Court of Appeals observed, this argument rests simply on an evaluation of the economic wisdom of the statute, 279 Md., at 428, 370 A.2d, at 1112, and cannot override the State's authority "to legislate against what are found to be injurious practices in their internal commercial and business affairs. . . ." *Lincoln Federal Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525, 536, 69 S.Ct. 251, 257, 93 L.Ed. 212. [footnote omitted] Regardless of the ultimate economic efficacy of the statute, we have no hesitancy in concluding that it bears a reasonable relation to the State's legitimate purpose in controlling the gasoline retail market, and we therefore reject appellants' due process claim.

437 U.S. at 124-25.

The opinion further stated:

It is worth noting that divestiture is by no means a novel method of economic regulation, and is found in both federal and state statutes. To date, the courts have had little difficulty sustaining such statutes against a substantive due process attack. See, e.g.,

Paramount Pictures, Inc. v. Langer, 23 F.Supp. 890 (ND 1938), dismissed as moot, 306 U.S. 619, 59 S.Ct. 641, 83 L.Ed. 1025; see generally Comment, Gasoline Marketing Practices and "Meeting Competition" under the Robinson-Patman Act, 37 Md. L.Rev. 323, 329 n.44 (1977).

437 U.S. at 124, n.13.

This Court's holding in *Exxon* reiterated a similar holding with respect to Congress' exercise of the commerce power. In *North American Co. v. Securities and Exchange Com'n*, 327 U.S. 686 (1946), this Court held that in the exercise of the commerce power, Congress could order a public utility holding company to divest itself of its subsidiaries even though its holdings had been acquired prior to the passage of the Public Utility Holding Company Act.

Thus, the Hawaii Legislature had the power to deal with the evils of economic concentration of landownership in a way which would eliminate the evil. Condemnation of the interests and distribution to the tenants as provided by the Legislature would atomize the concentration. In fact, it is the only conceivable way to increase the market for fee simple homes. Neither the opinion of the court below nor the concurring opinion recognizes the evils of concentration, nor does either propose another solution. To affirm the decision of the Court of Appeals is to hold that Hawaii cannot deal with the problem of economic concentration and that a federal court on the basis of its own knowledge can invalidate state legislation.

2. The Decision of the Court of Appeals Is in Conflict With the Decision of the Court of Appeals for the First Circuit

The opinion of the District Court and the dissenting opinion in the Court of Appeals rely on *Puerto Rico v. Eastern Sugar Associates*, 156 F.2d 316 (1st Cir.), *cert. denied*,

329 U.S. 772 (1946). In that case, the legislature passed two statutes providing for the condemnation of private land for four purposes:

(1) for acquisition and disposition to individual squatters for the erection of dwellings;

(2) for acquisition and disposition in larger parcels to individual farmers for subsistence farms;

(3) for acquisition and disposition in larger parcels by lease to expert farmers; and

(4) on the particular island involved, for acquisition and disposition to establish sugar and liquor industries.

Condemnation proceedings were instituted in an Insular Court and the action was properly removed to the District Court of the United States for Puerto Rico. The District Court dismissed the petition for condemnation without the taking of evidence on the ground that the taking was not for a public use and purpose and thus violated rights guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States. The Court of Appeals reversed. The Court of Appeals first held that the limitations imposed by the Fourteenth Amendment upon the Insular Government were substantially the same as those imposed upon the state governments and that the Insular Government's power of eminent domain was entitled to the same scope as that given to state governments. The court also reasoned that if *any one* of the uses was *not* for a public purpose, the action would have to be dismissed. The court did not approach the question of the validity of the statutes from the standpoint of the police power (the decision antedated *Berman*) but in almost the same words as those used by the Court of Appeals in this action, stated the issue as follows: "The argument is made that due process is denied because the purpose for taking the appellees' land is only to sell or

lease it to others for them to use personally instead of use by the general public." *Eastern Sugar Associates,* 156 F.2d at 323.

The Court of Appeals for the First Circuit upheld the validity of the Puerto Rico statutes and stated: "This argument has been advanced several times in the Supreme Court of the United States in cases of this sort and every time it has been rejected." *Eastern Sugar Associates,* 156 F.2d at 323.

The court stated its function as follows:

> Our function is to pass upon the statutes before us without regard to our views of the wisdom of the political theory underlying them; (McLean v. Arkansas, 211 U.S. 539, 547, 29 S.Ct. 206, 53 L.Ed. 315) it is our duty to determine whether their enactment rested upon an arbitrary belief of the existence of the evils they were intended to remedy, and whether the means chosen are reasonably calculated to cure the evils reasonably believed by the Legislature to exist. Tanner v. Little, 240 U.S. 369, 385, 36 S.Ct. 379, 60 L.Ed. 691. And thus, although we cannot substitute our estimate of the extent of the evils aimed at for that of the Insular Legislature, we are required to make some inquiry into the facts with reference to which the Legislature acted.

156 F.2d at 324.

The court took judicial notice of the social and economic conditions in Puerto Rico in light of its experience as a court having appellate powers over the Supreme Court of Puerto Rico.

The opinion of the court below in this case distinguishes *Eastern Sugar Associates* on the ground that Puerto Rico could have remained in possession of the condemned land after condemnation. 702 F.2d at 795. Appendix A, A-16.

This observation is not correct because at least three of the four uses required transfer to private persons and the court expressly stated: "Therefore if any one of those uses, each considered, however, as part of a broad, integrated program of agrarian reform . . . is not public, the petition was properly dismissed." *Eastern Sugar Associates*, 156 F.2d at 321.

3. The Court Below Erred in Failing to Defer to the Findings of the Hawaii Legislature

The court below erred in ignoring, in the case of Judge Alarcon's opinion,[5] and reappraising, in the case of Judge Poole's concurring opinion, discussed below, the extensive legislative findings made by the Hawaii state legislature in enacting the Land Reform Act. These findings included determinations that lessors, in renegotiating the initially generally affordable lease rents, adopted a practice of increasing land rentals in a manner unrelated to the value of the raw land; that these renegotiations brought about staggering increases in annual lease rents, which directly resulted in inflated land values; and that the effect of the leasehold system was found to have grave effects on the health, welfare and well being of elderly persons and to aggravate the already acute need for government sponsored low and middle income and elderly housing. Appendix A-134-35, A-152-55.

In choosing to ignore or reappraise on its own these extensive state legislative findings, the court below failed to accord the findings the deference required by previous decisions of this Court.

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[5]Judge Alarcon's opinion ignores the extensive legislative findings that form the basis of the Land Reform Act by dismissing them as mere "statutory rationalizations. . . ." 702 F.2d at 798, Appendix A-22.

a. The Court Below Erred in Failing to Give the State Legislative Findings the Weight and Deference Due From a Federal Court

The opinion of the court below justified its ignoring of the Hawaii legislative findings by holding that such findings are not entitled to the same weight as those of Congress.[6] 702 F.2d, 798; Appendix A, A-21. This was clearly error.

The lower court's justification contradicts this Court's decision in *Berman v. Parker*, 348 U.S. 26 (1954); there it was held that federal courts must defer to legislatively determined exercises of police power, which includes the exercise of the eminent domain power. In *Berman*, this Court, analogized Congress's exercise of the eminent domain power to that by a state and held that, "Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms wellnigh conclusive." 348 U.S. 32.

Each of the cases relied upon by the court below to justify ignoring the state legislative findings was decided prior to the *Berman* decision. Since *Berman* now makes clear that the doctrinal foundation for the exercise of eminent domain is the state's police power, the standard of review of the earlier cases relied upon by the lower court are no longer authority. The proper standard is that noted in the *Berman* decision and reiterated in *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 124 (1978): "[I]t is, by now, absolutely clear that the Due Process Clause does not empower the judiciary 'to sit as a "super-legislature to weight the wisdom of legislation" . . . .'"

Thus, the lower court's failure to accord the proper deference to the state legislative findings was error.

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[6] Whatever the proper weight to be given to the state legislative findings, it is clear here that Judge Alarcon's opinion gave those findings absolutely no weight whatsoever, but merely dismissed them as "statutory rationalizations."

b. The Court Below Erred in Relying on "Evidence" and in Reappraising the Findings of the Hawaii State Legislature

The pivotal concurring opinion below relied upon certain "evidence of record", 702 F.2d at 805; Appendix A, A-38, and looked to findings of fact in a related case in reappraising the findings of the Hawaii state legislature, 702 F.2d at 806; Appendix A, A-38. This was error for two reasons.

First, the concurring opinion notes that, "In determining public use, the court may consider extrinsic facts and examine the statute as a whole to 'discover the dominant purpose of the taking.' " 702 F.2d at 805 (citation omitted); Appendix A, A-37. However, no evidentiary hearing on the public use issue was ever held since the District Court expressly declined to rely upon any evidence or facts.[7] 483 F. Supp. 62, 65; Appendix A, A-71-72. Thus, assuming that the legislative findings, by themselves, were not sufficient to support a finding of public purpose, a hearing to consider the "extrinsic facts" should have been held.

The concurring opinion's error is made clear by this court's decision in *Clark v. Nash*, 198 U.S. 361 (1905). In that case, on error to the Utah Supreme Court, this Court recognized that a "taking from one person to give to another" might be invalid in most states but that special circumstances peculiar to a state might nevertheless justify the exercise of the condemnation power. This Court noted:

> This court has stated that what is a public use may frequently and largely depend upon the facts sur-

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[7] The trial court did note that Hawaii "has an uncommon system of landholding", and that there is a "concentration of land in a few large landholders." 483 F. Supp. 62, 67, 68; Appendix A, A-76-77. However, the trial court made this observation based solely on evidence introduced at a hearing on Plaintiffs' motion for a preliminary injunction, which was not consolidated with a hearing on the merits.

> rounding the subject, and we have said that the people of a state, as also its courts, must, in the nature of things, be more familiar with such facts, and with the necessity and occasion for the irrigation of the lands, than can any one be who is a stranger to the soil of the state, and that such knowledge and familiarity must have their due weight with the state courts. *Fallbrook Irrig. District v. Bradley*, 164 U.S. 112, 159, 41 L.ed. 369, 388, 17 Sup. Ct. Rep. 56.

198 U.S. at 369.

Since no hearing was held here to determine whether circumstances peculiar to Hawaii may support the Land Reform Act, the court should not have rendered a decision on whether a sufficient public purpose existed.

Second, the concurring opinion referred to certain findings of fact in the related case of *Midkiff v. Amemiya*, Civ. No. 47103 (Hawaii 1st Cir., June 29, 1978), *vacated as moot*, No. 7294 (Hawaii Supreme Court, April 14, 1982) Appendix K, in reappraising the state legislative findings. 702 F.2d at 806; Appendix A, A-38.

Such reappraisal of the state's legislatively determined support for the exercise of police power was improper. As noted above, it is the province of the state legislature to make such determinations and, once made, the federal courts are not "'to sit as a "super legislature to weigh the wisdom of legislation." . . .'"[8] *Exxon Corp. v. Governor of Maryland, supra*, at 124. No evidentiary hearing on the public use issue was held below since the trial court gave the proper deference to the legislative findings. 483 F.Supp. 62, 65; Appendix A, A-71-72. Thus, no inquiry whatsoever, much less one utilizing the appropriate minimal scrutiny

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[8] *Cf. Old Dominion Land Co. v. United States*, 269 U.S. 55, 66 (1925), holding that even under the pre-*Berman* test, Congress' determination of "public use" is entitled to deference until it is shown to involve an impossibility."

required by this Court, was ever made into these legislative findings. At the very least, some kind of hearing must be held, at which the minimal scrutiny called for by this Court's decision occurs, before the lower court could reappraise the legislative findings.*

4. The Federal Courts Should Abstain Pending Review by the Supreme Court of Hawaii

The dissenting opinion in the court below is sufficient to show that generally federal courts should abstain in eminent domain cases such as this. There are "special circumstances" in this case, however, requiring abstention under even the most narrow application of the doctrine of abstention. *Kaiser Steel Corp. v. W. S. Ranch Co.*, 391 U.S. 593, (1968) (Concurring opinion).

A holding that the Hawaii Land Reform Act is constitutional on its face and that an evidentiary hearing is unnecessary does not require abstention. But in the instant case the Hawaii Supreme Court on November 10, 1982, in two companion cases set aside two trial court summary

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*In this regard, the Hawaii Supreme Court recently refused to determine the constitutionality of this same Land Reform Act on motions for summary judgment and ordered a full hearing into the state and federal constitutionality of the act. *Hawaii Housing Authority v. Castle*, 65 Haw. , 653 P.2d 781 (1982); Appendix I, A-166; and *Hawaii Housing Authority v. Brown*, Civ. No. 8489 (Hawaii S. Ct., 1982), Appendix H, A-163. Such an extensive evidentiary hearing was recently held in a related case involving Appellees herein (Civ. No. 64308, [First Circuit Court, Hawaii]), and the state judge has orally ruled that the statute is constitutional. He will shortly be issuing extensive findings of fact and conclusions of law, which are most certainly to be appealed to the Hawaii Supreme Court. Thus, a state court determination of the application and meaning of the statute, and a determination of whether the statute can survive what may be a more exacting scrutiny than a federal court can impose, will shortly be handed down.

judgments upholding the constitutionality (state and federal) of the Act and remanded for trial on the issue of public use. Appendix H, I. It is academic to argue which proceedings were pending and which the Bishop Estate had settled during their progress in the state courts. There were certainly actual administrative and court proceedings extant at all times.[10] *See Steffel v. Thompson*, 415 U.S. 452, 459 n.10 (1974).

Wise judicial administration, conservation of judicial resources, and avoidance of duplicative litigation would suggest that the federal courts await the results of the hearing in the state court and review by the Hawaii Supreme Court to decide the constitutionality issue. *Colorado River Water Conser. Dist. v. United States*, 424 U.S. 800, 817 (1976). This Court has stated that it is "strongly inclined" to follow judgments of state courts to uphold eminent domain statutes and that state legislatures and courts are more familiar with facts relating to public use. *Clark v. Nash*, 198 U.S. 361, 368 (1905).

Abstention is appropriate because of the compelling public interest of the State of Hawaii in this litigation. *Younger v. Harris*, 401 U.S. 37 (1971). The Court of Appeals for the Seventh Circuit held it was proper to abstain in a condemnation case even though the condemnee claimed that the ordinance violated the Fifth and Fourteenth Amendments to the United States Constitution. *Ahrensfeld v. Stephens*, 528 F.2d 193 (7th Cir. 1975). That court stated:

> This respect and concern [for state court proceedings] arises clearly in relation to a state's eminent domain system. In *Louisiana Power & Light Company v. City of Thibodaux*, 360 U.S. 25, 79 S.Ct. 1070, 3 L.Ed.

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[10]After the decision of the Court of Appeals herein, the Bishop Estate sought unsuccessfully to enjoin a pending trial on the constitutionality issue. Appendix 179.

> 2d 1058 (1959), the Supreme Court noted the "sensitive nature" of federal court intervention in a state's eminent domain system, remarking that eminent domain was "intimately involved with state prerogative." *Id.* at 28-29, 79 S.Ct. 1070. Several federal courts have opined that state eminent domain proceedings should not be interfered with by federal courts because their local nature makes interference unwise.

528 F.2d at 198

and

> The presence of a federal constitutional claim in the federal court action does not preclude that court's staying its hand because, as this court and others have repeatedly stated in the past, "we must assume that an Illinois court would properly determine the merits of any federal issue properly presented to it." *Cousins v. Wigoda,* 463 F.2d 603, 607 (7th Cir. 1972). See also *Harrison-Halsted Community Group v. Housing and Home Finance Agency, supra,* at 106; *Georgia v. City of Chattanooga, supra,* 264 U.S. at 483-84, 44 S.Ct. 369; *Amalgamated Clothing Workers of America v. Richman Brothers,* 348 U.S. 511, 518, 75 S.Ct. 452, 99 L.Ed. 600 (1955).

528 F.2d at 198.

The court below pointed out the conflict between the Ninth Circuit and the Seventh Circuit as to whether *Younger* abstention should apply in eminent domain and land use cases and that this Court has not addressed the issue. *Midkiff,* 702 F.2d at 801-02 (Concurring opinion).[11] Appendix

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[11] A related, but different question is whether federal courts should abstain in eminent domain actions founded on diversity of citizenship; *See, Louisiana Power & Light Co. v. City of Thibodaux,* 360 U.S. 25 (1959) and *County of Allegheny v. Frank Mashuda Co.,* 360 U.S. 185 (1959).

A, A-27 to A-30. Inasmuch as due process issues arise in almost every condemnation and land use case it is important that this issue be resolved by this Court. *See,* Ryckman Jr., *Land Use Litigation, Federal Jurisdiction, and the Abstention Doctrines,* 69 Calif. L. Rev. 377, 425 (1981); Theis, *Res Judicata in Civil Rights Act Cases: An Introduction to the Problem,* 70 Nw. U.L. Rev. 859, 870 (1976).

Because the Hawaii Supreme Court had held that there must be a hearing on both federal and state constitutional issues, and because such a hearing was in progress at the time of the decision of the Court below, this case is strikingly similar to *Kaiser Steel Corp. v. W. S. Ranch Co.,* 391 U.S. 593 (1968). There, the District Court upheld what would otherwise have been an illegal trespass on the ground that the defendant, Kaiser Steel, had rights of eminent domain under a New Mexico statute. The Court of Appeals reversed, holding that the statute had no public purpose as required under the New Mexico Constitution, and refused to abstain. *W. S. Ranch Co. v. Kaiser Steel Corp.,* 388 F.2d 257, 262 (10th Cir. 1967), *rev'd,* 391 U.S. 593 (1968). Kaiser's claim for abstention was raised for the first time on rehearing based on a state court action it had filed after the opinion of the Court of Appeals. This Court held that the Court of Appeals erred in refusing to abstain because of the pending state court proceedings which would resolve the issue, ordering the District Court to retain jurisdiction pending expeditious resolution of the state proceedings. The concurring opinion pointed out that the issue was one of vital concern to the state of New Mexico so that there were "special circumstances" justifying abstention.

Thus, the "special circumstances" for abstention are:

1. The compelling economic and social interests of the State of Hawaii;

2. The existing state trial on the constitutional issue;

3. The error of the court below in reappraising of legislative findings; and

4. The need for findings by a state court on public use.

CONCLUSION

The Hawaii Land Reform Act may well be the most important piece of legislation enacted by the State of Hawaii. This importance and the failure of the court below to follow the decisions of this Court would seem to require plenary consideration.

On the other hand, the importance of the matter involving, as it does, evaluation of local conditions by a state court, suggests that it may be wiser to abstain pending the conclusion of the state proceedings.

Respectfully submitted,

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